In the text books it is everywhere emphasized that special expenses incurred may be allowed. The inference from that would seem to be that ordinary current expenses are not so allowed and that when a receiver undertakes to look after an estate for a certain percentage of the receipts he must himself bear such ordinary items as clerical assistance, office expenses, stationery and, I would add, the actual collecting of the rents unless the Court, considering the nature of the estate, thinks that the appointment of a rent collector at the expense of the estate is justified. There appears to be authority for saying that unusual or exceptional travelling expenses should be allowed by the Court and all proper expenses in the maintenance and upkeep of the property. There is also apparently authority for saying that the costs (by that I think is meant legal costs) incurred in passing the receiver's accounts before the Registrar should be allowed out of the estate.

The items queried in the present falsification come under five heads. The first is the purchase of carbon paper for typing accounts. That in my opinion should be disallowed. The second item is a proportion of the cost of the lighting of the office of the receiver. That I think should also be disallowed. The third item is the salary, $10 a month, for keeping the account books and doing general office work and that, I think, should also be disallowed. Even if not wholly disallowed, as it is, I think the amount is greatly excessive. The accounts for each month looked at over a number of months never amounted to more than three double pages and sometimes to less. The fourth item is the salary of a rent collector. Here again the item must be disallowed, though I am of opinion that in a proper case and on a proper application to the Court the Court might approve of such a salary to a rent collector. There is no application in that respect before me. In my opinion the property here would seem to be all situated, except Bukit Gong, inside the Municipal limits and no *prima facie* case appears where special salary to a rent collector should be allowed. The fifth item is a kind of omnibus item. Travelling $5 is queried. It is clear from the text books that reasonable travelling should be done free by the receiver but extraordinary or special travelling should be allowed him. If this is ordinary travelling it should be disallowed. There is a monthly item of $2 charged for stamps. If that is a correct charge it should be allowed but if that be a round figure and if a similar amount is actually expended only such sum should be allowed as has really been expended. There is one further item of $6 a month for a sweeper for keeping the office clean. The evidence is that this office is also used as a shrine for the family tablets and I think then that this item may reasonably be allowed to a receiver as money spent on the proper upkeep of the estate. It is well known that Chinese regard their ancestral tablets with the greatest possible reverence.

I have already stated that the nett result has been that this estate has had to pay the receiver's expenses amounting to, for a period of roughly two years, about 18% instead of 5%. The receiver's commission amounts to a total of $808 and his expenses for clerk, stationery and bill collector, to $1,900. That could scarcely have been the state of affairs contemplated by the Court when it first gave its ruling as to the percentage to be allowed.

I hold then that normally a receiver paid on a percentage of collections of an estate basis is not entitled to charge for clerical assistance, salary of a bill collector, office expenses, stationery or lighting.

I allow all the parties represented at the hearing of this summons in chambers their taxed costs out of the estate.

Order accordingly.

Solicitors for defendants:—
Braddell Brothers.

Solicitors for Chua Lip Giap:—*Rogers & Son.*
Solicitors for Chua Biow Liat:—
Zehnder Brothers.

Solicitors for Chua Lip Kee:—
Allen & Gledhill.

[COURT OF CRIMINAL APPEAL]

McELWAINE, C.J., TERRELL, AG. C.J. (F.M.S.), & PEDLOW, J.

December, 9, 1938

REX v. LIM SOON GONG AND TWO OTHERS.

[SINGAPORE MAGISTRATE'S APPEAL No. 63 of 1938]

The Penal Code, s. 379—Theft of sand from foreshore.

The foreshore down to ordinary low water mark is the property of the Crown. The foreshore is in the possession of the Crown though it may not be actually occupied. The protection of the Crown's sand and gravel of the foreshore is within the mischief of Cap. 114. Any person who takes sand from an un-alienated foreshore without authority from the Crown does an act forbidden by section 13 of the Crown Lands Encroachment Ordinance.

Quaere: Whether the sea bed between ordinary low water mark (and/or low water mark of ordinary spring tides) and the outward limit of territorial waters is the property of the Crown.

CRIMINAL APPEAL.

McELWAINE, C. J.—This is an appeal against an order of acquittal and as the points at issue are points of law the procedure might appropriately have been by way of a special case reserved under section 317 of the Criminal Procedure Code, but as the Crown desired the case to be heard by a court of three Judges, an ordinary appeal was lodged and the case was set down for hearing before three Judges under section 306 (3) of the Criminal Procedure Code.

The respondents were charged That they, on or about the 18th day of May 1938 at Singapore, committed theft of sand from the foreshore at the 6½ mile stone East Coast Road, the property of the Crown, and thereby committed an offence punishable under section 379 of the Penal Code.

At the trial the repondents, on being charged, admitted taking sand from the shore between high and low water mark, and the learned magistrate reserved judgment on the question whether this admission amounted to a plea of guilty under section 379 of the Penal Code.

The Crown rested its case on the admission made by the accused and called no evidence.

In his grounds of judgment the learned magistrate said:—

> "The prosecution brings forward no proof as to the ownership of this portion of the sea beach or foreshore. Under section 379 of the Penal Code possession by some person is essential. This point is stressed in *The Queen* v. *Tomma Ghantaya* I.L.R. 4 Mad. 228".

The learned magistrate then referred to the note in 6 Malayan Law Journal p. Lviii on the unreported case of *Tan Seng* v. *Rex* and said that the argument in that case was that foreshore is not Crown land but an area over which both the Crown and the public have certain rights and that the Judge apparently upheld this view as on the Crown's appeal he decided that the offence, if any, of taking sand could only have been committed under the Foreshores Ordinance and that, as that Ordinance contained no penal provision, no offence was committed.

The magistrate therefore found the charge to be groundless and acquitted the accused.

The acquittal was based on the proposition that under section 378 of the Penal Code there cannot be theft unless the property alleged to have been stolen was in the possession of some one and that the foreshore was not normally in the possession of the Crown and that this particular piece of foreshore was not shewn to be in the possession of the Crown.

The realm extends to the low water mark of ordinary tides and by Common Law the Crown is *prima facie* entitled to every part of the foreshore between the ordinary high and low water marks. 28 Halsbury, section 663. *Attorney-General* v. *Chambers* 4 De G.M. & G. 206. *Attorney-General* v. *Emerson* (1891) A.C., 649. So much of the soil of the sea as lies between ordinary low water mark and low water mark of spring tides appears not to be part of the realm though jurisdiction is exercisable over such soil.

Apart from statute appropriating any part of the sea bed within territorial waters to the Crown and apart from the effective occupation of the sea bed as by the erection of breakwaters, lighthouses or other structures it appears doubtful whether the sea bed between the low water mark of ordinary spring tides and the outward limit of territorial waters is the property of the Crown.

Beyond ordinary low water mark is the high sea and in the opinion of the majority of the Court in *The Queen* v. *Keyn* 2 Ex. D. 63 the sea bed beyond this mark is not, in the absence of express legislation or effective occupation, the property of the Crown. The Territorial Waters Jurisdiction Act 1878 did not affect ownership of the sea bed.

A number of cases in which there are dicta to the contrary are collected in 28 Halsbury note (n) to paragraph 653 while in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1914) A.C. 153 the Privy Council declined deciding the point.

The point of ownership of the sea bed below low water mark appears therefore to be open to doubt though the Crown can by legislation prohibit interference with the sea bed in any way which is likely to be a danger to the safety and convenience of ports and harbours, or to obstruct navigation or which may tend to contribute to coast erosion, because a State is entitled to protect itself. The Imperial Parliament can also by statute confer ownership in the Crown over the sea bed in territorial waters.

I mention these points because during the argument I understood the Solicitor-General to assert that the sea bed within territorial waters is the property of the Crown. That point was certainly not fully argued and I express no opinion as to whether the sea bed under territorial waters as distinct from the foreshore is the property of the Crown at Common Law apart from actual occupation by some structure erected by the Crown.

The case was argued on the basis of foreshore alone and I refrain from venturing seaward of the ordinary low water mark.

The charge lays the taking "from the foreshore" and the accused admit taking sand "from the shore between high and low water mark."

The precise point of taking is not indicated but I take it to have been between high and low

water mark of ordinary tides because there is no evidence that the tide on 18th May, 1938, was a spring and not an ordinary tide.

On this basis, when the respondents took sand from the foreshore they took sand from Crown property and the sand was Crown property.

It was argued by the Solicitor-General that such taking is theft and is also an offence under section 13 of the Crown Lands Encroachments Ordinance.

According to English law realty or anything attached to the realty cannot be the subject of theft until it is severed from the realty and unless between the severing and asportation there has been abandonment.

Section 378 of the Penal Code renders abandonment unnecessary as an ingredient of theft of anything attached to the earth. See Explanations 1 and 2 and illustration (a).

> "Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft".

The thing that can be stolen is "moveable property" and this is defined by section 22 as including "corporeal property of every description, except land and things attached to the earth".

Now, I think "land" in this definition means an area of the earth's surface and does not mean a sod cut from the land. What can be stolen is something that can be moved. A field cannot be moved so a field cannot be the subject of theft. "The earth" means this terrestrial globe. A tree cannot be stolen while it is attached to the earth because while so attached it cannot be asported. It would be absurd to treat "the earth" as meaning mould or clay and to assert that a sapling which was pulled up could not be the subject of theft because earth was attached to the roots.

But mould sand, earth, stone etc. can be dug or quarried out of a piece of land and when so dug or quarried they are undoubtedly "moveable". They are also *prima facie* the property of the person who owned the land from which they were taken.

I have no doubt severed things, peat, coal, stone etc. can be stolen in England by the severer provided there has been a real or fictitious abandonment of these by the severer and section 378 only differs in this respect from the English Common Law in that it eliminates the abandonment as an element of the crime.

I therefore think that *Suri Venkatappayya Sastri* v. *Madula Venkanna* I.L.R. 27 Mad. 531, and *Queen Empress* v. *Shivram* I.L.R. 15 Bom. 702 were correctly decided when they decided that soil or stone when severed from the earth is moveable property capable of being the subject of theft, and that the contrary opinion of the majority of the Court in *Queen Empress* v. *Kotayya* I.L.R. 10 Mad. 255 was erroneous.

There remain two questions, did the respondents take "dishonestly", and was what they took in the "possession" of the Crown

The essence of dishonesty is intention. "Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person is said to do that thing "dishonestly." " Section 24. " 'Wrongful gain' is gain by unlawful means of property to which the person gaining it is not legally entitled. 'Wrongful loss' is loss by unlawful means of property to which the person losing it is legally entitled." To be dishonest a person must intend to gain by unlawful means property to which he is not legally entitled, or he must intend to cause loss by unlawful means of property to which the loser is legally entitled.

The Crown was legally entitled to this sand and the respondents were not.

But I think a person must know that he is not, and that some one else is, legally entitled to the property.

Property may be taken under a *bona fide* though mistaken belief of right or in the *bona fide* though mistaken belief that it belongs to no one or has been abandoned. The circumstances must be such as to shew or to raise a presumption that the person intended to do something which he knew or should have known was wrongful. *Mens rea* is essential to theft and illustrations (m) (n) and (p) shew this.

Theft is not one of those statutory offences which is committed by doing the thing forbidden by the statute whether there is *mens rea* in the ordinary sense or not.

The onus is on the Crown to prove not merely the act of taking but also the dishonest intent, that it was done intentionally without just cause or excuse. The respondents were not bound to satisfy the court of their innocence, it is sufficient if they raise a doubt as to their innocence. *Woolmington* v. *Director of Public Prosecutions* (1935) A.C.

If guilty knowledge had been established, the offence of theft would have been established.

The second point is was this sand in the possession of the Crown? The foreshore is in the possession of the Crown though it may not be actually occupied. 'Possession' in section 378 relates not to land but to moveable property. But in my opinion moveable property which has not been lost or abandoned or placed in the possession of some one else remains in the possession of the owner. A motorist has a break-down. He leaves his car on the roadside while he goes off to

look for assistance. In his absence some one takes the car and appropriates it to his own use. This is theft. The sand was as much in the possession of the Crown as the tree is in the possession of Z in illustration (a).

The police guard in the *Queen* v. *Tamma Ghantaya* I.L.R. 4 Mad. 228 was not essential to the possession of the swamp if the swamp was the property of the government.

The presence of the police guard was a warning that the swamp and its contents were not abandoned and rendered impossible any mistaken belief in an implied or presumed consent to take the salt.

The present is a test case from which I infer that the rights of the Crown are not generally known. The respondents may have honestly thought that in the absence of warning notices and in the absence of previous prosecutions there was the same tacit consent to take the sand as is assumed by the picker of blackberries by the way side. In such case the taking would not be dishonest. If, in all the circumstances of the case, the magistrate doubted whether the taking was dishonest he should not accept the admission as a plea guilty of theft.

The Solicitor-General does not ask that the case be remitted to the magistrate and I think for the purposes of this case it is sufficient to say that in the absence of evidence of alienation the foreshore is the property of the Crown subject to certain public rights analogous to rights of way, that the sand when dug became moveable property in the possession of the Crown and as such was a commodity capable of being stolen if taken dishonestly without the consent of the Crown.

The second branch of the Solicitor-General's argument was that foreshore being Crown land the taking of this sand is an offence under section 13 of the Crown Lands Encroachments Ordinance (Cap.114), and that the magistrate, if not satisfied that theft had been committed, should have convicted under the Encroachments Ordinance.

Foreshore is land while uncovered by the sea and it belongs to the Crown. In the Crown Lands Act 1836 foreshore is regarded as Crown land. Section 11 of the Crown Lands Encroachments Ordinance gives a right to any persons who have taken possession of and improved Crown land "not being part of the shore or bed of the sea" to apply for a grant. The articles enumerated in section 13 include things such as shells which are more commonly found on a foreshore than inland. The protection of the Crown's sand and gravel on the foreshore is within the mischief of Chapter 114.

The view that foreshore is Crown land is not negatived by section 5 of the Foreshores Ordinance (Cap.122).

When foreshore is reclaimed or any area of land has been reclaimed from the sea, it may be declared to be Crown land subject to the Crown Lands Ordinance. The purpose of this provision is not to take Crown land what before was not Crown land but to extinguish those public rights which existed when the Crown land was foreshore.

In my opinion any person who takes sand from unalienated foreshore without authority does an act forbidden by section 13 of the Crown Lands Encroachments Ordinance.

The words "knowingly and wilfully" which are used in section 12 are not used in section 13 and *mens rea* appears to be unnecessary to constitute liability to a fine under the latter section.

Although section 13 does not use the word "offence" the imposition of a fine indicates that the act forbidden by the section is an offence, and this offence can be committed even under circumstances negativing moral turpitude, but some degree of moral turpitude attaches to theft under the Penal Code. Under the latter *mens rea* is necessary, under section 13 of the Encroachments Ordinance it is not.

The act committed in this case is one to which section 176 of the Criminal Procedure Code applies and the respondents might have been charged under either section 379 of the Penal Code or under section 13 of the Crown Lands Encroachments Ordinance and by virtue of section 177 of the Criminal Procedure Code they might have been convicted of the latter offence although they were not charged with it.

For the reasons I have given I think an offence under section 13 of the Crown Lands Encroachments Ordinance has been proved.

Had the learned magistrate taken the same view of the case as I have taken he would possibly have acted under section 183 (2) of the Criminal Procedure Code and, without recording a conviction, have made an order discharging the respondents conditionally on their entering into bonds to be of good behaviour and to appear for conviction and sentence when called upon.

But on an appeal from an acquittal I am not satisfied that under section 310 the High Court has power to make any such order.

I therefore set aside the order of acquittal and substitute an order convicting the respondents of an offence under section 13 of the Crown Lands Encroachments Ordinance.

The Solicitor-General has informed us that he merely desired a decision on the law and that he did not press for any penalty.

Under these circumstances and having regard to the fact that these respondents have lost time and probably work in attending this Court on several occasions when the hearing was neces-

sarily adjourned, I think that a nominal penalty will meet the justice of the case and I therefore impose a fine on each of the three respondents of ten cents.

Now that it has been declared that the unauthorised taking of sand from the foreshore is an offence future offenders may find themselves sentenced to very substantial punishment.

TERRELL, AG. C.J. (F.M.S.)—I have had the advantage of reading the judgment of the learned Chief Justice, and agree with his conclusions and have very little to add. I doubted at one time whether the possession of the Crown in the foreshore was of such a nature as to support a charge of theft. I think, however, that evidence of effective possession is not necessary, and that possession for the purpose of section 378 of the Penal Code is implicit in the Crown's ownership.

I entirely agree with the interpretation placed by the learned Chief Justice on section 5 of the Foreshores Ordinance (Cap. 122). When the case of *Rex* v. *Tan Seng* (Singapore Magistrates Appeal No. 49 of 1937) was heard before me in July of last year the Magistrate had acquitted the accused, and as no argument was addressed to me by the Crown such as would satisfy me that the Magistrate was wrong, the appeal was dismissed. The question of the scope of section 5 of the Foreshores Ordihance was however, fully dealt with by the Solicitor General upon the hearing of the present appeal and I am satisfied that his submissions were sound and that there is nothing in section 5 to support the argument that the foreshore is not Crown land.

I agree, therefore, that the appeal should be allowed and a nominal fine inflicted.

PEDLOW, J.—I have had the opportunity of reading the judgment of the learned President of the Court. With respect I concur in that judgment and have nothing to add.

Appeal allowed.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.